LIBRARY
SUPREME COURT, U. S.

JUN 18 1969

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 140

CHRISTOPHER JACKMAN, et al.,

v.

JOHN M. BODINE, et al.

THE ELIZABETH DAILY JOURNAL, et al.,

v.

ROBERT J. BURKHARDT, et al.

IN THE MATTER OF THE APPORTIONMENT COMMISSION PLAN FOR 1969.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for the Apportionment Commission.

WILLIAM MILLER,
Special Counsel,
Of Counsel and on the Brief,
One Palmer Square,
Princeton, New Jersey 08540.
(609) 921-6077.

ALLEN D. PORTER,
On the Brief.

MacCrellish & Quigley Co., Printers, Trenton, New Jersey

TABLE OF CONTENTS

PAGE

AUTHORITIES CITED i

ARGUMENT

The petition for a writ of certiorari should be denied since the action of the New Jersey Supreme Court lacks the finality required for review by the United States Supreme Court, under 28 U. S. C. § 1257 1

CONCLUSION 4

AUTHORITIES CITED

Cases Cited

Jackman v. *Bodine*, 43 N. J. 453, 205 A. 2d 713 (1964); 49 N. J. 406, 231 A. 2d 193 (1967); and 53 N. J. 585, ... A. 2d .... (1969) 1, 2

Mahoney v. *Burkhardt*, U. S. Dist. Ct., N. J., Civil No. 1021-68 (May 7, 1969) 4

Republic National Gas Co. v. *Oklahoma*, 334 U. S. 533 (1964) 3

Swift & Co. v. *Wickham*, 328 U. S. 111 (1946) 3

Statute Cited

28 U. S. C. § 1257 ..... 1, 3

Other Authorities Cited

Annotations, 97 L. Ed. 208 and 89 L. Ed. 1186 3

Boskey, *Finality of State Court Judgments under the Federal Judicial Code*, 43 Colum. L. Rev. 1002 3

ARGUMENT

The petition for a writ of certiorari should be denied since the action of the New Jersey Supreme Court lacks the finality required for review by the United States Supreme Court, Under 28 U. S. C. § 1257.

In *Jackman* v. *Bodine,* 43 N. J 453, 478, 205 A. 2d 173 (1964), the New Jersey Supreme Court reserved "jurisdiction in this cause to determine applications for such further or different relief as may be appropriate and to determine such further relevant controversies as may arise." Following the adoption of the New Jersey Constitutional Amendments, by referendum of November 8, 1966, the same court considered the constitutionality of the New Jersey constitutional provisions in light of the decisions of this Court. In *Jackman* v. *Bodine,* 49 N. J. 406, 231 A. 2d 193 (1967), the State court remanded certain matters of apportionment to the Apportionment Commission with the instruction that it "make a seasonable recertification of assembly districts for the 1969 election." (47 N. J. at 419-420.)

On March 4, 1969, the State court heard a petition by the Apportionment Commission for leave to intervene in *Jackman* v. *Bodine* and for instructions. The court denied the petition without prejudice to renewal, but did answer several questions posed by the petition, in the course of the oral argument on the motion. The Apportionment Commission accelerated its proceedings and made its recertification on April 7, 1969.

The State court thereupon, upon its own motion, notified all parties to *Jackman* v. *Bodine* and any other interested parties to file objections by April 14, and permitted the Apportionment Commission to respond by April 18.

In response to the State court invitation, nine challenges to the apportionment as certified were heard. These in-

cluded various details of the effect of the apportionment in specific situations. With two exceptions, there were no formal pleadings filed. All objectors, including the present petitioners, were heard on April 21, 1969, informally, upon the basis of memoranda submitted to the court. The present petitioners have never filed a complaint, and the State court has yet to render a judgment in the matter at bar.

In its per curiam opinion disposing of the various objections to the apportionment as certified, 53 N. J. 585, ... A. 2d ... (1969), the State Supreme Court wrote at 589:

> "Mindful of the need to continue orderly government, we are constrained to conclude that the broad constitutional issue to which we have just referred should not be entertained at this time. We will however schedule the subject for full argument this fall, to the end that the matter may be settled, if possible, well in advance of the 1971 election."

Subsequently, on May 14, 1969, the Clerk of the Supreme Court of New Jersey circulated the following memorandum:

> "TO COUNSEL IN THE REAPPORTIONMENT CASES
>
> These cases have been set down for further argument on Monday, September 22, 1969, with respect to the constitutionality of the provisions of our State Constitution respecting apportionment.
>
> All briefs shall be filed by August 15th and shall deal with all questions, including the question whether it is possible to adhere to the following lines without creating intolerable deviation from the one man-one vote concept: (1) county lines, (2) municipal lines, (3) ward lines and (4) election district lines. Applications to intervene shall be filed with the Court not later than June 15, 1969."

Review in this Court upon writ of certiorari is limited to *"final judgments or decrees"* of the highest court of a state. 28 U. S. C. § 1257. This requirement of finality of the State court decision has been repeatedly applied by this Court.

The requirement that there be a final State court judgment is based on two major considerations: (1) orderly judicial processes which avoid piecemeal review and (2) smooth and harmonious functioning of the state and federal judicial systems. See, *e.g., Republic National Gas Co. v. Oklahoma,* 334 U. S. 62 (1948). For a general discussion of the finality doctrine, see *Annotations,* 97 L. Ed. 208 and 89 L. Ed. 1186; see also Boskey, *Finality of State Court Judgments under the Federal Judicial Code,* 43 Colum. L. Rev. 1002.

In the present posture of the case at bar, the action of the State court is anything but final. It has permitted further applications to intervene until June 15, 1969, and has required additional briefs to be filed by August 15, for a further argument set down for September 22, 1969. Thus, no judgment has been entered, nor will any judgment be entered, disposing of the constitutional issues which have been raised until after the argument on September 22. An application to this Court for a writ of certiorari is thus premature in light of the pending posture of the matter before the State court.

The petitioners might argue, in reply, that they should not be frustrated by the action of the State court in deferring a decision on the basic constitutional issue. There are two simple answers to such an argument: first, to the extent petitioners have selected the forum, they must abide by its processes; and, second, if the petitioners are unwilling to abide by the State court's processes, they have the alternative of invoking the jurisdiction of a three-judge federal court, with the right of direct appeal to this Court. *Swift and Co.* v. *Wickham,* 328 U. S. 111 (1946).

Other objectors have in fact challenged the senate districts by invoking a three-judge court in *Mahoney* v. *Burkhardt*, U. S. Dist. Court, N. J. Civil Action No. 1021-68. On May 7, 1969, the three-judge court dismissed the action to permit the orderly processes of the New Jersey Supreme Court to be concluded.

CONCLUSION

The petition for writ of certiorari should be denied for lack of a final judgment or decree to which it could relate. The State court has scrupulously applied the prescriptions of this Court in the previous litigation in the *Jackman* v. *Bodine* series of decisions, and should be allowed to proceed with an orderly review of the present challenges.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for the Apportionment Commission

WILLIAM MILLER,
Special Counsel,
Of Counsel and on the Brief.